Supreme Court, U.S.
FILED
DEC 30 1992
OFFICE OF THE CLERK

No. 92-722

In The
Supreme Court of the United States
October Term, 1992

SPENCER GIFTS, INC.,

Petitioner,

v.

JOHN D. OLITSKY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY OF PETITIONER

DANIEL JOSEPH, P.C.*
LAWRENCE D. LEVIEN, P.C.
ROXANE N. SOKOLOVE, P.C.
MIRIAM S. SAMUEL
AKIN, GUMP, STRAUSS, HAUER
& FELD, L.L.P.
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 887-4000

*Counsel of Record

Attorneys for Petitioner Spencer Gifts, Inc.

December 30, 1992

In The
Supreme Court of the United States
October Term, 1992

No. 92-722

SPENCER GIFTS, INC.,

Petitioner,

v.

JOHN D. OLITSKY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

REPLY OF PETITIONER

---

1. The Opposition plainly admits that the Fifth Circuit justified its affirmance on the ground that Spencer had not made its objection before trial. The Opposition first states that the Fifth Circuit made no holding on the point. (Opp. at 8-9.) However, it then admits the opposite by asserting that the Fifth Circuit had held that the district court had appropriately "consider[ed] . . . Spencer's relaxed attitude toward those issues

as evidenced by . . . its failure, despite filing a voluminous motion *in limine*, to include this among the points."[1]

Indeed, the Opposition's characterization of the Fifth Circuit's holding as faulting Spencer's "relaxed" reliance on a contemporaneous objection under Fed. R. Civ. P. 46, shows how the Fifth Circuit's holding will have the serious effects complained of in the Petition. No lawyer can bear to be thought of as "relaxed" in pursuit of a client's interests. The Fifth Circuit decision will therefore induce counsel to feel that exclusive reliance on objections made during trial pursuant to Fed. R. Civ. P. 46 and Fed. R. Evid. 103(a) will reflect an inadequately zealous attitude. Pretrial motions will, in effect, become mandatory and proliferate. The Opposition does not challenge this assertion.

2. The Opposition notes that the Fifth Circuit never ruled with precision on the question of how much prejudice was caused to Spencer by Olitsky's testimony about the size of the verdict. Opp. at 8-9. Rather than help Olitsky's position, this observation points up that the Fifth Circuit was able to avoid making a precise holding on that issue (and also on the question of the adequacy of the corrective jury instruction) by ruling that Spencer was responsible for the prejudice to itself because Spencer had failed to cover the issue in a pre-trial motion. See Pet. 8. In this way Olitsky again succeeds in pointing out how

---

[1]Olitsky asserts that because Spencer did not object to Olitsky's counsel's mention that there had been a prior trial, Spencer cannot be heard to object that Olitsky testified that he had won a large jury verdict at that trial. Opp. at 9. Olitsky justifies the second remark by saying that it was only "a breath away" from the first. But it takes only a breath to commit wrongs of many kinds, and here the inflammatory and prejudicial information was not the simple fact that there had been a prior trial, but the result that the prior jury had reached in that trial.

important to its disposition of the case was the Fifth Circuit's disapproval of Spencer's failure to file a motion *in limine*.

Contrary to Olitsky's assertion (Opp. at 8), Spencer was correct to observe that it is unquestioned that the testimony in the second trial about the size of the jury verdict in the first trial was highly prejudicial. Indeed, the Fifth Circuit approvingly quoted the Third Circuit's holding in *Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338, 1350-51 (3d Cir. 1975) that "[t]he admission of a prior verdict creates the possibility that the jury will defer to the earlier result and thus will, effectively, decide a case on evidence not before it." Pet. App. 8a. The Fifth Circuit then sought to distinguish *Coleman Motor* by holding that the prejudice to Spencer was "at least partly" Spencer's fault. Pet. App. 8a.

3. Contending vaguely that "the facts are to the contrary," Olitsky also makes an unsupported challenge to Spencer's showing that Spencer sought in discovery, but that Olitsky failed to disclose, the information that proved objectionable at trial. Opp. at 2, 7 fn.2. The record clearly supports Spencer. The objectionable testimony about the size of the first jury's verdict was Olitsky's characterization of a conversation between Olitsky and a wholesale gift salesman named Bruce Shouting. Pet. App. 32a. Shouting's name had never appeared in discovery responses, even though Spencer had, in several ways, sought such information. Indeed, one deposition question before the second trial was precisely aimed:

> Q: [Spencer's counsel] Let me ask the question once again, Mr. Olitsky. Have you had any conversation with others in the industry, and by in the industry, I mean in the merchandising industry, about this lawsuit since the first trial, which was February of 1987?

> A: [Olitsky] As I said, it's been two and a half years, and in that time span I don't recall that there were any conversations. It could be it blended into prior to the trial.

Deposition of Olitsky, February 26, 1989, at 13.[2] Thus this question sought information about conversations with anyone in the gift industry concerning the first trial, and it should have educed information about the Shouting conversation because Shouting is in that industry and Olitsky's conversation with him was about the result in the first trial. In his deposition, however, Mr. Olitsky made no mention of it.

This underscores how draconian the doctrine announced by the Fifth Circuit is. Despite its discovery efforts, Spencer was not aware before the second trial that Olitsky had had discussions with people in the gift industry about the amount of the verdict in the first trial; nonetheless both courts faulted Spencer for failing to raise the point in a pre-trial motion. This doctrine clearly rewards less than complete responses to discovery.[3] The wisdom of Rule 46 is clear: whatever has

---

[2]To assure that the discovery materials showing Spencer's attempts to obtain this information (and Olitsky's responses) were in the record, Spencer sought to supplement the record in the district court, notifying the court of appeals by an explanatory letter dated May 6, 1992, a copy of which is appended to this Reply. See Addendum at A-1, A-3. The district court denied the motion, and Spencer made a similar motion to the court of appeals, which granted it pursuant to Fed. R. App. P. 16(b).

[3]Olitsky states that "neither the district court nor the Fifth Circuit ruled that Spencer in any way mislead [sic] Spencer about what evidence would be introduced." Opp. at 7 fn. 2. This is technically correct; even though Spencer complained

happened in discovery or before trial, at least an objection made at the time the court rules on the evidence will be timely.

4. With respect to the second issue in the Petition, concerning the Fifth Circuit's holding that evidentiary holdings in criminal cases are "at best, weakly analogous in civil cases" (Pet. App. 9a), the Opposition responds inaccurately. First, the Opposition asserts, the Fifth Circuit did not rely on this ground. Opp. 11. But the Fifth Circuit clearly gave this as an "[a]dditional[]" reason for its affirmance. Pet. App. 9a. Second, the Opposition asserts that the authorities cited by Spencer merely stand for a "general" proposition, and that application of that proposition to particular cases rests on application of broad discretion by district courts. Opp. at 13-14. But that is not what the Fifth Circuit held. It did not rely on any discretion of the district court but on the general proposition, of its own formulation, that evidentiary rulings in criminal cases are "only weakly analogous" to civil cases. That proposition is directly contrary to that which, Olitsky concedes, the authorities cited in the Petition establish. Opp. at 13.

---

both to the district court (Pet. App. 28a) and the Fifth Circuit that Spencer had been unfairly surprised by the testimony about the conversation with Shouting, neither court did or said anything about the issue.

Olitsky's claim that "Spencer asserted it had somehow obtained a pretrial ruling from the court reporter . . . " (Opp. at 7 fn. 2) is absurd. Spencer had merely asked the reporter what the court's practice was. See Pet. App. 24a-25a.

CONCLUSION

For the reasons stated herein, as well as in the Petition, a writ of certiorari should be granted.

Respectfully submitted,

DANIEL JOSEPH, P.C.*
LAWRENCE D. LEVIEN, P.C.
ROXANE N. SOKOLOVE, P.C.
MIRIAM S. SAMUEL
AKIN, GUMP, STRAUSS, HAUER
& FELD, L.L.P.
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 887-4000

*Counsel of Record

Attorneys for Petitioner Spencer Gifts, Inc.

ADDENDUM

AKIN, GUMP, HAUER & FELD, L.L.P.
1333 New Hampshire Avenue, N.W.
Suite 400
Washington, D.C. 20036
(202) 887-4000

May 6, 1992

U.S. Court of Appeals
FILED
May 8, 1992
GILBERT S. GANUCHEAU
Clerk

BY FEDERAL EXPRESS

Office of the Clerk
United States Court of Appeals, Fifth Circuit
600 Camp Street
New Orleans, Louisiana 70130

RE: Olitsky v. Spencer Gifts, Inc.
No. 91-1010

Dear Sir or Madam:

It has come to the attention of Spencer Gifts, Inc., the Defendant in the above captioned action, that certain pleadings and discovery responses were inadvertently excluded from the record at the District Court which was certified to this Court on appeal. Spencer, has, today, applied to the District Court for the Northern District of Texas to have these documents accepted by the District Court for filing and certification as a supplement to the record on appeal. A copy of that motion, exclusive of attachments, is attached hereto as Exhibit A. These pleadings and discovery responses include:

1. Spencer Gifts, Inc.'s Interrogatories and Requests for Admission dated December 27, 1984, including Interrogatory No. 18:

Interrogatory No. 18

Identify each and every person having knowledge of facts relevant to this suit including specifically the claims and defenses identified in both parties' pleadings.

2. Plaintiff's Answers to Defendant's Interrogatories and Request of Admission dated January 25, 1985, including Plaintiff's Answer to Defendant's Interrogatory No. 18:

Answer

John Olitsky, Kathy Olitsky, Gene Brog, Hank Roth, Jerri Hurvitz, Bob McNally.

3. Spencer's Interrogatories and Requests for Production of Documents dated December 24, 1988, including Interrogatory Nos. 10(a) and 16:

Interrogatory No. 10(a)

Identify all persons having information relevant to your claims or Defendant's defenses in this matter, who have not been disclosed heretofore in discovery or at trial, whether or not you intend on calling such witness at trial in this action.

Interrogatory No. 16

Please supplement each and every response to Defendant's interrogatories, previously served upon you in this matter, for which you have new information, newly discovered information, or other information not previously produced.

4. Plaintiff's Answers to Defendant's Interrogatories and Request for Production of Documents dated January 26, 1989, including Plaintiff's Answers to Interrogatory Nos. 10(a) and 16:

Answer to Defendant's Interrogatory No. 10(a):

None

Answer to Defendant's Interrogatory No. 16:

To the extent, if any, that this interrogatory requests plaintiff to compare the testimony and documents introduced at trial of this matter in February, 1987 with responses to defendant's previous interrogatories, plaintiff objects since the information requested is presently in the possession of defendant and the answer would be unduly burdensome and serve no practical function. Otherwise, plaintiff agrees to supplement responses to defendant's interrogatories previously served plaintiff in this matter for which he has new information, newly discovered information, and information not previously produced to the extent that such information became available to plaintiff and/or was not introduced at the trial of this matter in February, 1987.

5. The transcript from the oral deposition of John D. Olitsky dated February 26, 1989, including the following exchange on page 13:

Q. Let me ask the question once again, Mr. Olitsky. Have you had any conversation with others in the industry, and by in the industry, I mean the merchandising industry, about this lawsuit since the first trial, which was February of 1987?

A. As I said, it's been two and a half years, and in that time span, I don't recall if there were any conversations. It could be it blended into prior to the trial.

Spencer Gifts, Inc. has submitted its request to the District Court to certify these portions of the record in light of the discussion at oral argument before this Court on the admissibility of the Olitsky's testimony at trial concerning the first verdict.

Sincerely yours,

Lawrence D. Levien, P.C.
Roxane N. Sokolove
Carol Stephenson